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## FOREIGN SERVICE DESPATCH

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FROM : USPOLAD, Tokyo

915

DESP. NO.

TO : THE DEPARTMENT OF STATE, WASHINGTON.

December 17, 1951

DATE

REF : Misdes 871, December 7, 1951

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SUBJECT: FCN Treaty with Japan

PER Hansen OFFICE CDCFADRC FOR CASE NO. 7902996

Further exploratory talks have been held with officials of the Ministry of Foreign Affairs in connection with the Department's standard draft for an FCN Treaty. In addition to the points raised regarding the preamble and first five articles of the standard draft - as reported in the despatch under reference - the Ministry's representatives have made the following informal proposals and requests for further clarification by the Department:

Article VI:

1. The Japanese propose that the phrase, "shall not be subject to molestation or to entry without just cause", be amended to read "shall not be subject to unlawful entry or molestation". They declare that the latter phraseology is not only clearer when translated into Japanese, but also that it follows more closely the wording employed in the treaties with Ireland, Israel, Greece, and Denmark.

2. The phrase "full equivalent of the property taken", is still under consideration by the Japanese who state that local laws permit compensation in kind in certain cases. It is not believed, however, that they will press their suggestion for a modification in this wording.

3. The Japanese believe that Paragraph 4 of this Article should - because of its subject - be an entirely separate article, employing exactly the same phraseology. They point to the treaty with Greece as an example of this separate treatment.

4. The Japanese further propose that the extension of national and MFN treatment in Paragraph 5, Article VI, should not be limited to Paragraphs 2 and 3, as specified in the standard draft, but should also extend to Paragraph 1. Their suggested change reads "with respect to the matters set forth in Paragraphs 1, 2, and 3 of the present Article".

Article VII:

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1. In view of conditions already in effect regarding the business activities of foreigners in Japan, the Ministry's representatives declared that Article VII in its present form was far too general and would be subject to various interpretations when translated into Japanese. They raised a number of questions regarding this article and concluded that they preferred the more precise form employed in the treaties with other countries. They proposed, therefore, that Articles VII and VIII of the treaty with Colombia be substituted for Article VII of the standard draft.

2. The Japanese further pointed out that Japan presently restricts the purchase of stocks in local currency by foreigners, and propose that a reservation on this point be incorporated in a protocol to the treaty.

3. In connection with Paragraph 2, Article VII, of the standard draft the Japanese questioned whether certain rights acquired by foreigners under the Occupation would be exempt from the application of new limitations imposed on aliens. This is another expression of the Japanese hope that none of the "unusual conditions of Occupation" will be further supported under the provisions of the treaty.

4. If their proposal regarding the use of Articles VII and VIII of the treaty with Colombia is not acceptable, the Japanese will request consideration of a new draft Article VII clearly enumerating the various types of business activities contemplated under this article.

#### Article VIII:

1. The Japanese stated that they prefer the wording employed in the treaty with Greece, and propose that Paragraph 1 of this article be so amended. They propose, therefore, the additional phrase "on a temporary basis" after the clause "shall be permitted to engage". They further propose another addition towards the end of the paragraph so that this might read, "such nationals and companies, on the exclusive account of their employers in connection with the mining..." The Department's comments on these points would be appreciated since an explanation of why this wording may have been necessary only in connection with Greece might satisfy the Japanese representatives.

The Japanese further propose that Paragraph 2 be amplified to enumerate the professions reserved to nationals (pilots, notaries public, etc.), as was done in the treaties with Greece and Denmark.

3. Also in connection with Paragraph 2, the Ministry's representatives questioned whether Japanese in the United States were not in fact barred from certain professions by various State laws "merely by reason of their alienage". Further information was requested regarding

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the practice of law, medicine, and engineering in the various States. The Department's comments on this point - regarded as of great importance by the Japanese - would be most helpful.

4. The question was also raised as to whether Paragraph 3 of this article should not be included in Article VII, because of its similar subject matter.

Article IX:

1. The Ministry officials urged that the standard draft article - the only one which specifically establishes one set of standards for Japanese and another for Americans - be revised. They strongly requested the deletion of Paragraphs 1 and 2, and the adoption of a "uniform formula applicable to both parties" as in the treaty with Denmark. They pointed out that Article IX in its present form would raise serious problems in the Diet regarding Japanese ownership of real property in various States - a subject on which Japanese officials are particularly sensitive. The Ministry's representatives declared that they plan to discuss this point with the Prime Minister, but will await the Department's reply on the acceptability of the wording employed in the treaty with Denmark.

2. The Japanese requested information as to the "enterprises carrying on particular types of activity" (Paragraph 4) in which alien interests are restricted. They expressed particular interest regarding the types of enterprises of this kind which might exist in the United States.

Article X:

The Japanese representatives stated that they understood that the question of copyright protection need not be covered in a treaty of this kind, since other appropriate international agreements refer specifically to copyrights. They added, however, that industrial property rights are similarly treated under the "Convention d'Union pour la Protection de la Propriete Industrielle", recently ratified by both the United States and Japan. They question the need, therefore, for dealing with industrial property rights - and not with copyrights - in the present treaty and request full clarification of this point in order that an adequate explanation may be made to other Ministries and the Diet.

Article XI:

1. With respect to clauses (a) and (b) of Paragraph 5, Article XI, the Japanese expressed a preference for the terminology employed in the treaty with Colombia. They propose, therefore, that "specific tax advantages" in the standard draft be amended to read "specific advantages as to taxes, fees and charges", and that the following clause (b) read "accord special advantages" instead

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of the standard draft's "accord special tax advantages".

2. In clause (c) of Paragraph 5, the standard draft mentions special provisions with respect to "non-residents", while the treaty with Ireland (Article IX) uses the terminology "non-resident nationals". The Japanese indicated they prefer the latter phraseology, but that they will study this point further if any clarification of the standard draft wording can be furnished.

#### Article XII:

The Ministry's representatives appeared to agree with Mission officers that this article on exchange controls will permit the continuation of measures to safeguard Japan's balance of payments position. The Japanese pointed out, however, that it will be necessary at times to limit import allocations in one currency in order to promote imports from a specific area (an example is the present emphasis on imports from the Sterling Area because of Japan's excessive holdings of sterling). If such freedom of action is not contemplated under Article XII - or if it might be restricted under Paragraphs 3 (b) and 5 of Article XIV - the Japanese may request the addition of another clause similar to that on inconvertible currencies covered in Paragraph 5 of the Protocol to the treaty with Uruguay. The Department's earliest comments on the question raised by the Japanese - and on their proposal for an additional clause similar to that in the Protocol with Uruguay, or in Paragraph 6 of the Protocol to the treaty with Israel - would be appreciated.

#### Article XIII:

No questions were raised on this article by the Ministry's representatives.

#### Article XIV:

1. The Japanese point out that the last sentence in Paragraph 1, beginning "A like rule...", is not contained in any other United States treaty. Although they indicated they had no objection to this clause, they requested its further clarification. According to the Japanese interpretation, MFN treatment with regard to the international transfer of payments for imports and exports refers to the actual transfer formalities, and does not limit Japan's right to discriminate against any currency or country in the implementation of its quarterly foreign exchange budgets. The same reservation is made in connection with Paragraphs 2 and 3 b regarding restrictions on imports under the quarterly budget system.

2. With respect to Paragraph 3, the Japanese point out that sub-paragraph (a) is not included in the treaties with Colombia and other countries. Japan presently publicizes its quarterly foreign exchange budgets and issues specific import allocation notices.

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Government officials believe, however, that the latter probably result in price increases on the part of foreign suppliers, and it is possible that the import notice system may be modified. Although the Japanese are not opposed in principle to this sub-paragraph, they do not feel that it is a matter properly included in a bilateral treaty. Since this is a general subject of interest to all countries, multilateral treatment is preferred. The Department's comments on the need for the inclusion of sub-paragraph (a) with respect to Japan alone have been requested by the Ministry's representatives.

3. The Japanese wish to impose restrictions on imports of prison-made goods, and on exports of national treasures and certain natural resources subject to conservation controls. They inquired whether such restrictions were properly covered by Paragraph 4 ("prohibitions or restrictions on sanitary or other customary grounds of a non-commercial nature"). The Mission's explanation that this clause gave Japan the right to impose restrictions along the lines indicated above was accepted by the Ministry's representatives.

4. The rather broad terminology employed in Paragraph 5 regarding national and MFN treatment "with respect to all matters relating to importation and exportation" has also been questioned in connection with foreign exchange budget allocations. The Japanese want to make certain that their present frankly discriminatory import allocation policies are permissible under the various articles of the treaty.

#### Article XV:

No reservations on the part of the Japanese representatives.

#### Article XVI:

No reservations.

#### Article XVII:

A number of questions were raised by the Japanese in connection with state trading in view of the existence of the Government Monopoly system (e.g., on tobacco and salt) in Japan. All points were explained satisfactorily, but the Japanese again requested assurances that their Monopoly trading could be carried out under foreign exchange budget policies without contravening this or other articles in the standard draft. They pointed out that Government Monopoly purchases could be made from certain sources, despite higher costs as compared with other suppliers, in order to utilize inconvertible currencies. At the present time, Sterling Area prices on some commodities are 30 per cent higher than dollar area prices. Clarification is requested as to whether a Government Monopoly could procure Sterling Area goods regardless of the price factor - thus

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Reducing Japan's mounting sterling credits - within the framework of Article XVII.

Although progress has been somewhat slow in the past four informal conferences - the Japanese attaching great importance to the various points outlined above - it is believed that the exploratory talks may be concluded by December 18. The Ministry's representatives have indicated that they will begin discussions about December 18 with other Ministries to ascertain their views on what may be points of negotiation in the contemplated formal negotiations. They have informed the Mission that, in order to prevent leakages to the press which they regard as likely, they will use the published text of the treaty with Colombia in their discussions with other Ministries. They have requested, however, that the various proposals and questions now reported receive prompt consideration as they may be called upon for detailed explanations by other Government agencies. The Ministry's representatives stated that they believe that the Japanese Government would be ready to proceed with formal negotiations by about January 15, 1952.

The Department's earliest reply on the various questions and proposals set forth above would be appreciated.

For the Political Adviser:

*Peyton Kerr*  
Peyton Kerr  
First Secretary of Mission

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FOREIGN SERVICE DESPATCH

FROM: USPOLAD, Tokyo

TO: THE DEPARTMENT OF STATE, WASHINGTON

December 19, 1951

REF: Misdes 871, December 7, 1951; Misdes 915, December 17, 1951

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SUBJECT: FCN Treaty with Japan

DECLASSIFICATION DATE 11/17/79

PER Harary OFFICE CAC

FADRC FOI CASE NO. 7902989

Informal discussions between representatives of the Ministry of Foreign Affairs and the Mission were concluded on December 17. Although a number of requests for clarification or additional information, as well as some suggested changes, have been submitted by the Japanese, it is not known at this time with any degree of certainty which if any of the Foreign Office comments may develop into questions requiring negotiation. As previously indicated, the purpose of these informal discussions was to clarify for the Japanese Foreign Office representatives those standard draft provisions which they did not fully understand. The Foreign Office is now prepared to confer with other interested Japanese Ministries in order to ascertain their views. After these conferences take place, it is expected that a coordinated and consolidated Japanese position will result, which should give a fairly definite indication of the nature and extent of the points for negotiation. It is believed that the representatives of the Ministry of Foreign Affairs, who have been most cooperative, have now acquired a good working knowledge of the standard-draft provisions and are able to discuss the proposed treaty with other Ministries and formulate a consolidated Japanese position.

In addition to the points raised previously by the Japanese representatives -- as reported in the Mission's despatches under reference -- the following questions and suggestions on their part are submitted to the Department for its comments:

Article XVIII:

1. The Japanese raised a number of questions regarding this article, since they wondered whether shipping conferences would be considered as falling under the provisions of Paragraph 1. The Mission's representatives pointed out that if shipping conference activities were conducted in accordance with established fair trade practices -- as clearly defined under current Japanese laws -- they would not be among those organizations which restrain competition and whose elimination is called for in this article. The Japanese accepted this interpretation, but indicated that further questions regarding shipping conferences might arise in the contemplated negotiations.

2. With reference to Government trading practices (Paragraph 2), the Japanese again pointed to the Government Monopoly system in Japan, as they had in connection with Article XVII. In answer to their questions regarding the operations of such Monopolies with respect to this paragraph, the Mission's representatives stated that

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only Government enterprises in competition with private business (a situation which does not exist under the Government Monopoly system) were referred to in this paragraph. This appeared to satisfy the Ministry's representatives, although they indicated they might request further clarification of this point.

#### Article XIX:

1. The final clause of Paragraph 3, beginning "but each Party may reserve", was regarded by the Japanese as pertaining to Article XIX in its entirety, and they suggested that this clause be made a separate paragraph. This suggestion was withdrawn after it was explained by the Mission that this clause was now in its most suitable place. It is possible, however, that a further request for separate treatment may be made during the formal negotiations.

2. The Japanese originally suggested that "coasting trade" (Paragraph 3) be fully defined as in the FCN Treaty with Greece (Article XXI, Paragraph 6). It was suggested by the Mission that specific definition on this point -- as on many other points which the Japanese wished to define more precisely -- would lead to a cumbersome, and probably incomplete, description. The Japanese stated they would again consider this matter, and might withdraw their suggestion.

3. With respect to "national fisheries" (Paragraph 3), the Japanese interpretation was that "exclusive rights" would be granted fisheries in territorial waters, but that this paragraph also envisaged other "privileges" (i.e., entry, treatment in ports, et cetera) to all "national fisheries" operating both in territorial waters and on the high seas. The Mission's representatives stated they believed this was a correct interpretation.

4. The Japanese believe that the terminology employed in Paragraph 5 is too general, and request consideration of a new and more specific paragraph along these lines. They suggest that Article XV of the Japanese draft (forwarded to the Department under cover of the Mission's despatch No. 246, August 16, 1951) be used as a draft for this paragraph. They pointed to the treaty with Greece (Article XXII) as an indication that a more specific wording has been used in some instances.

5. In connection with the definition of "vessels" (Paragraph 6), and the fact that "fishing vessels or vessels of war" are excluded except as regards Paragraph 5, the Japanese raised the following points:

a. Why are fishing vessels excluded from the provisions of Paragraph 2? What other recognition of nationality can be extended such vessels as ocean-going tuna or whale catchers? The Japanese urgently request a clarification of this question, and indicated they desire to extend the provisions of Paragraph 2 to fishing vessels.

b. The Japanese clearly understood the need for including vessels of war with respect to treatment outlined in Paragraph 5, but indicated they might encounter technical difficulties with the Diet because of the terminology employed. They pointed to the possible political significance which Diet members might attach to this clause and stated that it might be



easier to secure Diet ratification if another term were used. Various informal suggestions as to the Ministry's possible explanation of this point were made by the Mission's representatives; these appeared to be helpful to the Japanese representatives who then declared they would reconsider their proposal for a re-drafting of this paragraph.

Article XX:

The Japanese drew attention to the fact that current security export controls call for specific export licenses for all goods shipped from Japan, including those goods which have entered in transit. They requested assurances that the security export control system would not constitute "unnecessary delays and restrictions", as specified in this article. In view of our interest in the continued implementation of effective export controls, the Mission's representatives stated that security controls would not be regarded as being in violation of this article.

Article XXI:

1. The Japanese representatives made the following observation with reference to Paragraph 3:

"Although Japan earnestly desires to become a member of GATT, it is feared that Japan may not be admitted into GATT (at least for some time to come). If the special advantages accorded under a multilateral treaty not open to Japan, such as GATT, are treated as outside of the application of the MFN clause, it would nullify the purpose of the treaty providing for unconditional MFN treatment. Furthermore, it will set a bad precedent for other treaties to be concluded between Japan and other countries. (Mission's Note: The Japanese hope that their treaty with the United States will be a model for all their other FCN treaties.) For this reason it is desired that no such exception as provided for in the second sentence of Paragraph 3 be made, and that this sentence be deleted".

This is probably the major reservation made by the Japanese representatives during the informal talks. They attach a great deal of importance to this matter, on which the Department's earliest comments would be appreciated.

2. The Japanese propose an additional and separate paragraph embodying the statement on political activities presently in Paragraph 3, Article VIII, of the standard draft. They have no objection to a repetition here of the same phrase now in Article VIII. They propose, however, that if the Department does not wish to repeat this clause, that it be listed as an exception under Article XXI, and not included in Article VIII.

3. The Ministry's representatives proposed the following sub-paragraph (f) to Paragraph 1:

"(f) necessary to safeguard the external financial position or balance of payments of a Party, provided such measures are proportionate to the circumstances and not applied in an arbitrary or unreasonable manner".

The Japanese officials stated that this sub-paragraph may not be necessary in view of the Mission's previous explanation that Japan's present foreign-exchange control measures are permissible under this treaty (see discussion under Articles XII and XIV, Mission's despatch No. 915, December 17, 1951). They request the addition of this clause, however, if there is any limitation implied in the treaty to Japan's right to maintain its present foreign-exchange controls and to regulate the volume of trade with certain areas by means of the quarterly foreign-exchange budget system.

4. With reference to sub-paragraph (a), Paragraph 1, the Japanese wished to include many other precious metals in the restricted list (e.g., platinum, rhodium, iridium, and others presently subject to export and exchange controls). The Mission's representatives stated they believed such a specific listing might become cumbersome, and suggested that Japan had the right to restrict the importation or exportation of items other than gold and silver under either sub-paragraph (c) or (d). The Japanese replied they were satisfied with this explanation, but requested that this point be referred to the Department for its further clarification. They enquired whether such necessary restrictions on shipments of other precious metals might be permitted under Articles XII and XIV.

#### Article XXII:

1. The Ministry's representatives stated that they believed that a definition of the word "products" might be needed if no Japanese equivalent acceptable to other Ministries can be found. They believed that the definition might not be necessary, but suggested that the Department give consideration to such an additional clause (similar to that embodied in the treaty with Greece, Article XXIV, Paragraph 7).

2. With reference to Paragraph 3, the Japanese stated that they regard only the first sentence as a "definition", and proposed that the second sentence be incorporated in Article VII. After some discussion on this point, the Ministry's representatives withdrew their proposal and stated they would study this matter further.

#### Article XXIII:

The Japanese officials clearly understood that this treaty would not, under the present circumstances, apply to the Ryukyu Islands. However, since Japan has not lost sovereignty over the Ryukyus, it is suggested that the phrase "sovereignty and authority" (instead of the presently drafted "sovereignty or authority") might be appropriate.

#### Additional Japanese Proposal:

The Ministry's representatives stated that Japanese exporters generally believe -- although few, if any, actual cases can be cited in substantiation -- that U.S. Customs' officials view Japanese prices with suspicion and therefore often set arbitrary and unrealistic prices for the assessment of duties. Japanese businessmen feel, they added, that their certified bills of sale or even consular invoices are often disregarded by U.S. Customs' officials. Despite an explana-

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tion of U.S. Customs procedure and policy by the Mission's representatives, the Ministry's representatives requested that consideration be given the inclusion -- in any appropriate article of the treaty -- of a statement on customs' valuation similar to that in Article XXIV, Paragraph 1, of the Japanese draft (an enclosure to the Mission's despatch No. 246, August 16, 1951). They pointed out that a similar provision is incorporated in GATT (Amended Text, Article VII, Paragraph 2 (a through c)).

Another meeting with the representatives of the Ministry of Foreign Affairs is scheduled for December 21 or 22 for the purpose of reviewing the many points already discussed. It is believed, however, that no additional questions will arise at that time which may warrant reference to the Department.

For the Political Adviser:

*Peyton Kerr*

Peyton Kerr  
First Secretary of Mission

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USPOLAD,

TOKYO

A-439 Dec. 31, 1951

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Subject: Commencement of Informal Discussions of FCN Treaty.  
Mission Despatch 871, DEC 7.

I. There follow comments on points raised in reference DESP concerning specific treaty provisions.

Preamble

1. The Japanese suggestion that the sequence of the references to investments and commerce be reversed would be acceptable.

2. The Department is not sure that it follows the Japanese reasoning with regard to the phrase "otherwise establishing". The Preamble is merely descriptive in a very broad and summary way of the general purposes of the Treaty. It does not serve to create specific rights, and is not operative except as a general guide to principles of interpretation. The operative parts of the treaty are the specific provisions of the numbered Articles and the Protocol, which contain all rights and privileges created by the Treaty. Rights not found there cannot be asserted by reference to the Preamble.

There would be no objection, nevertheless, if the Japanese desire, to deleting the word "otherwise", as this word may be regarded as redundant.

3. The DEPT can appreciate that the Japanese might perceive some novelty in phraseology stipulating "unconditional national treatment". The adjective "unconditional" is commonly placed in juxtaposition with m-f-n treatment only; and it will be observed that the wording suggested by the Department deliberately avoids literally saying "unconditional national treatment".

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In these treaties, the Department wishes to establish the proposition that in general national treatment provisions are to be applied untrammelled by specific reciprocity qualifications. To illustrate, take the first national treatment clause occurring in the Treaty, namely, PARA 1 of Article IV, dealing with the subject of workmen's compensation. Purely for the purpose of argument, suppose that the laws of the States generally provided compensation for occupational diseases (for example, silicosis), whereas the laws of Japan did not. Under the interpretation favored by the Department, the Japanese workmen in the US would be entitled to the benefits provided by domestic law for silicosis, notwithstanding that an American workman in Japan could not claim any such benefit in Japan because the Japanese law failed to cover silicosis at all. That is to say, "national treatment" in the US means the same treatment that American citizens receive in the US, without reference to what Japanese subjects receive in Japan; and vice versa. The national treatment obligation operates automatically and without conditions; the reciprocity it involves is simply the reciprocity of obligation to accord that which nationals of the country are accorded.

In the context of mutual understanding of the principle of interpretation generally applicable, as above set forth, the Department agreed to the following wording in the preamble to the Treaty with Greece: "the principles of national and of unconditional most-favored-nation treatment reciprocally accorded", which the Greeks proposed for rhetorical reasons. A similar phraseology is not necessarily precluded in the case of Japan; but the Department will await the further development of discussions before determining whether it should be authorized.

Article I. This Article is in part a link between the Preamble and the rest of the Treaty. It introduces the Treaty by declaring the equitable purposes the Treaty is designed to serve; and the equitable principles the two signatories undertake to apply in particular cases are spelled out by the specific terms of the provisions commencing with Article II. However, Article I in addition serves a two-fold further purpose. It suggests that where

two constructions

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two constructions of the treaty's provisions are equally possible in a given instance, the construction leading to an equitable result is to be preferred over the construction leading to an unequitable result. This is in conformity with established doctrine, as followed by the courts in the US, that treaties are to be construed and applied in a broad and liberal spirit. Secondly, it serves as a guiding principle in cases where the exact terms of the treaty's provisions do not afford complete and definitive guidance.

The Department is aware that "equitable" is not at all a precise term; and that it would probably be only in extreme or unusual cases that Article I could afford a basis for a treaty protest, independently of the other provisions of the Treaty, since the more exact legal rules of the latter define the normal commitments the two countries will have undertaken. It may be noted that the term "equitable" is not altogether novel in current international usage. It may be found, for example, in the ITO Charter and in other international instruments as well as in recent literature dealing with international law and justice. It has been standard practice, also, with respect to treaty rules on state trading (Article XVII, paragraph 2), where it has not proved possible yet to devise a more precise rule owing to the nature of the thing dealt with.

Article II. Insofar as immigration is concerned, the most-favored-nation provision of the Italian Treaty is very greatly modified by Article XXIV, paragraph 7, of the same instrument, so that the net result is the same as that of the draft proposed by the Department to the Japanese. The technique of the Italian Treaty is needlessly cumbersome, verbose and capable of giving a misleading impression. The structure of Article I of the Italian Treaty was that of an

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earlier model US draft, now long abandoned in favor of the more compact draft as proposed to Japan. The necessary reservation was placed in Article XXIV rather than in Article I because the Italians preferred it that way. It may be noted that the Department no longer considers that the most-favored-nation standard adds anything to a provision dealing with elementary human freedoms, and might serve only to weaken it.

Article III.

1. It would be acceptable to insert the adjective "unlawful" before the word "molestations". Whether this adjective is in or out depends upon whether it appears to be redundant in the language of the country with which the treaty is concluded. The intent and meaning of the provision is the same in either case. It may be noted that the word "unlawful" is understood in a broad sense, to cover actions contrary to either municipal or international law.

2. The reference to the international law standard is usual in the treaties signed by the US, and is preferred over the formula adopted in the Colombia Treaty. The basic standard for diplomatic protection of citizens abroad is international law, rather than local law. The Department considers that this fact is not altered by the careful wording of the Colombia Treaty. But this fact does tend to be somewhat obscured in the Colombia Treaty; and the Department is not yet ready to agree to the rewording proposed by the Japanese.

3. The addition of the phrase "accused of crime", though previously usual in US treaties, would unjustifiably limit the protection sought in paragraph 2. The phrase is therefore no longer contained in the Department's standard draft; and the Department trusts that the Japanese will indeed see fit to withdraw their proposal.

Article IV.

Paragraph 1. Workmen's compensation, to which this provision relates

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relates, is principally or exclusively under State jurisdiction in the US. The provision as offered by Department would cure, for the benefit of Japanese nationals, the alien disabilities existing in a large number of State statutes. The concluding phrase ("on account of ... etc."), about which the Japanese asked clarification, is a term of art adopted on the advice of a leading expert in the field with the object of giving treaty right to the maximum range of workmen's compensation covered by the law of any State. The words "disease" and "due to the nature of employment", for example, reflect advances in the legislation of certain States designed to correct such inadequacies of earlier laws as that tuberculosis was not a compensable disability because, although the consequence of a kind of work the victim had engaged in, it was not a "bodily injury" and was not technically speaking contracted "in the course of employment". Phrasing the treaty in terms of the appropriate words of art is believed to help State authorities understand readily what their obligations under the treaty are.

Paragraph 2. The treaty does not create any rights to be employed in the civil service; and US law generally prohibits aliens from becoming Government employees. Hence the question of Government pension rights does not arise.

The phrasing of the Danish Treaty grew out of the differences between the US and the Danish systems, the former being compulsory and the latter technically not. Special language had to be framed, therefore, to achieve the desired objective of actual mutuality. Provision for old age, sickness and disability benefits was omitted because Danish law and policy was such that it was not feasible for Denmark to undertake the commitment in the broad and simple terms proposed by the US. Inasmuch as relatively very few Americans are normally interested in foreign social security benefits, as compared with the number of aliens interested in US benefits, the Department is generally quite prepared to entertain proposals from the other side to reduce the scope of the social security provision.

The control wording employed ("compulsory system ... etc.") reflects the characteristics of the US system which is intended to be

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to be covered by the treaty, and to leave no misunderstanding about types of benefits of a social security nature which it is not intended to cover (e.g., State "relief" and "public assistance" programs). The system in question requires the participation of its beneficiaries, who are also required to contribute to its financing through payroll deductions fixed by law; and it falls in the category of an "insurance", as opposed to a charity, scheme.

It is desired, of course, that the final wording of Article IV be of comparable effectiveness in both countries. The Mission should therefore explore with the Japanese whether the wording initially proposed by the Department is adequately adapted to the characteristics of the Japanese system.

Article V.

1, 3. In the context of paragraph 2 as now drafted, the qualification proposed by the Japanese concerning public order and morals would serve no useful purpose. The provision as drafted by Department does not limit either country's freedom of action as to recognizing and enforcing awards, except with respect to two factors: namely, the nationality of the arbiters and the situs of the arbitration. Each country is otherwise fully at liberty to apply such generally applicable commercial arbitration policy as it sees fit. If the law wishes to refuse to enforce an award, whether foreign or domestic, on the grounds of incompatibility with public order or morality or any other legitimate standard, the treaty would not interfere. The treaty proposal of the Department is deliberately cautious and moderate, so as to allow the broadest flexibility, and in recognition of the present very uneven development of commercial arbitration law in the several States of the Union. The treaty seeks no more than to prevent arbitrary discrimination.

The provision on awards in the Greek Treaty represents complete restatement. The reference to "public policy" (not, in the English text, "public order and good morals", as the Japanese suggest) was necessary and proper because of the affirmative manner in which this version was drafted. If the Japanese would be willing to accept

the Greek

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the Greek Treaty version in toto, the Department would be most happy to concur in making the substitution. The version in the Greek Treaty (developed experimentally during negotiation) has the advantage of being a more positive and comprehensible assertion of the objective sought; and the Department is inclined to believe, as do apparently also the Japanese, that it is preferable.

2. As the double phrase "tribunals and agencies" has become standard in US treaty practice, the Department would prefer not to delete one of the words, leaving the other standing alone, lest it be inferred that the intent was to narrow the scope of the provision. If the word continues to trouble the Japanese, perhaps it would be possible (a) to find some synonym for the whole phrase, or (b) to substitute for the word "tribunals" some other word (such as, possibly "bodies" or "boards"), or (c) if the problem is merely one of translation, it may be possible to leave the term as it is in English but make a free translation into Japanese.

As visualized by the Department the use of the word "tribunal" does not imply the existence of administrative courts independent of the regular judiciary, where the same do not exist in a country, although it is broad enough obviously to cover them if and when they do exist. As to the question raised by the Japanese with reference to the US situation, there is a considerable number of Boards, commissions, bureaus, agencies and designated officials who are charged with rule-making and adjudicatory duties (e.g., the Federal Communications Commission, Federal Trade Commission, the Secretary of Agriculture) - they have functions often described as "quasi-legislative, quasi-judicial". The precise extent to which their exercise of these functions is reviewable by the courts may vary, but all are subject to the rule of law and all must comply with procedures, limitations and standards prescribed by statute; all are at least answerable to the courts for strict fulfillment of the requirements of the Constitution and of the statutes under which they operate; and none may adjudge crimes or impose criminal penalties, this being the prerogative of the judicial courts alone. Because such administrative entities have now come profoundly to control and influence

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and influence economic life, however, it is important to the alien that he enjoy the same right of access to them as the citizen, with reference to protecting and furthering his lawful rights and interests.

It may be appropriate to suggest that the provisions of the Japanese constitution to which allusion is made are perhaps calculated to achieve what has been established in the United States concerning the supremacy of an independent judiciary in all judicial matters.

4. As to the significance of the words "domestication" and "registration", both are used in order to make certain that the broad purpose of the sentence in which they occur is achieved. There are technical differences between the two words. The former is a process which may be said to do to the corporation, for local purposes, something equivalent to what the process of naturalization does to an alien individual who takes out local citizenship. The latter on the other hand does no more, necessarily, than it implies; in and of itself, a simple act of registration does not imply that the corporation has in any way lost its alien juridical character. It is included because, nevertheless, "registration" is often a name given to a process which subjects the alien corporation to a degree of local jurisdiction going much beyond that which is necessary in the circumstances envisaged in the treaty provision, and to unnecessary costs.

II. General remarks.

The Mission may reassure the Japanese that the draft proposed by the Department as basis for negotiation is altogether a "standard" draft, identical in all particulars with that currently proposed for negotiation with other countries. Any differences between it and recently signed treaties (excepting the treaty with Ethiopia) reflect either (a) revisions which have resulted from further study and the increase in the Department's negotiating experience, and which have been adopted in the interests of improving the readability and adequacy of the draft as a universal basis for negotiation, or (b) individual modifications and adjustments which have been

formulated

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formulated during the course of a particular negotiation, as part of the process of adapting the draft, on a mutually satisfactory basis, to the views and circumstances of the country concerned. The Department suggests that there is little or nothing of any great significance in the draft presented to Japan that is not present either in the Denmark Treaty or in the Israel Treaty, or in both. These, being the two treaties most lately to be concluded, are closest in composite (allowance made for their negotiated revisions) to the standard draft in its present form. Although this draft has now reached an advanced stage of evolution, the process of studying ways in which it may be still further improved has not ceased; and, accordingly, the Department may wish, at an appropriate time, to suggest to the Japanese a few revisions, none of them, however, materially altering the Department's initial proposals.

The Department will plan to reply as promptly as possible to the Mission's reports, and to supply the Mission with information of both factual and policy nature designed to clarify all questions raised, in at least a preliminary fashion. The Mission should not hesitate to request instructions on any questions, for even apparently small points sometimes sound in elements of treaty doctrine and interpretation which are uniformly applicable to treaties negotiated with all countries. The Japanese of course appreciate that the discussions are on an ad referendum basis.

The Department thoroughly approves the Mission's plan to report promptly and in full on the discussions as they occur. These reports should include a description of all explanations given. It often happens that the informal preliminary conversations effectively dispose of many points; the other side becomes satisfied with the clarifications given informally and does not renew its questions at subsequent stages of the discussion and negotiation. The record of the preliminary stage may therefore be the only record to which reference can be made in later years for the purpose of verifying the interpretation intended to be given some passage in the treaty about which question arises.

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The Department recommends that precautions be taken to assure that the record accurately reflects mutual understanding, in order to minimize possibilities of disputes over interpretation after the treaty comes in force. One device which has been used on previous occasions has been agreed and initialled minutes of each meeting. This highly precise device, however, is not necessarily the indicated solution or the most feasible solution; it would probably be unnecessary, in any event, in preliminary informal discussions such as are now in course at Tokyo. An alternative device which the Department has found efficacious in post-war negotiations often has been as follows: the US side prepares an office-file memorandum of conversation which it invites the other side to inspect in rough draft, for the purpose of noting any necessary corrections. Copies of the finished draft of this memorandum are then given to the other side - one for its Washington Mission's files and another for the home files of its Foreign Office. Other alternatives are of course conceivable; and the Mission may develop what ever procedure it finds most expedient.

The Department is pleased that discussions between the Mission and the Foreign Office are now underway and are expected to proceed in a businesslike manner. The Japanese may be confident that the Department wishes to treat with Japan as with any sovereign nation and wishes the Japanese to understand that, in suggesting to substitute the Department standard draft for the initial Japanese draft, there was no desire to be arbitrary or to suggest that the latter would not have been a feasible starting point with proper modifications. On the other hand, it will undoubtedly also be evident that in characterizing the draft as solely a "basis for negotiation", without prejudicing the possibility of changes therein at the initiative of either side during negotiation, the Department does not imply that it is prepared to compromise essential principles or policy.

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